citizens, to pay, since under it, A who owns one million dollars worth of realty and no personalty escapes taxation, while B who owns one hundred dollars worth of personalty is taxed; — and yet obviously A is more able to pay than is B. If the state can collect a tax of this sort, solely from the owners of personalty lying without the jurisdiction, a tax on red-headed persons to the exclusion of others, being scarcely less arbitrary, would seem to be legal. Taxation is relative; the amount that A pays must bear some fair ratio to the amount that B pays, and as the present case infringes upon this principle, by taxing A without taxing B who is equally able to pay, it is invalid. It might be suggested that, since this form of taxation has been practiced for a long time, it has become sanctioned by law and hence is due process. The court, however, seems properly to have considered that, for the decision of the question at issue, a broader concept of due process of law is required.

"TENTATIVE" TRUSTS IN SAVINGS BANK DEPOSITS. — A trust may be created without consideration either by a transfer of the property to another as trustee,[1] or, since Lord Eldon's time, by a mere declaration by the owner that he holds the property in trust.[2] Though a power of revocation may be reserved,[3] a trust without such power, when once created, is irrevocable.[4] These fundamental principles have sometimes been lost sight of by the courts in considering cases of trust deposits in savings banks, a common form of gratuitous trusts. Massachusetts, for example, arbitrarily requires notice to the beneficiary.[5] New York also appears to depart from principle. By a case decided in that jurisdiction last year, it was held, contrary to previous decisions of the lower court,[6] that the mere fact that a deposit stands in the depositor's name as "trustee" for another is not ground for holding that an irrevocable trust was created, but establishes the creation of a "tentative" trust merely, revocable by the depositor in his lifetime.[7] As a question of evidence, the decision is not unreasonable, for in view of the common practice of making deposits in the form of trust accounts to evade some rule of the bank,[8] it is perhaps unsafe to find from the mere form of deposit an actual intent to create a trust; and if such intent is not found, no trust should be held created.[9] But the decision strikes deeper than that; it assumes that a trust was created, but treats it as revocable. Moreover, the court says that if the depositor dies without having revoked the trust, the presumption arises that an absolute trust was created as to the balance on hand at his death. Much can be said, it is true, in favor of the result of the decision, for it gives effect to the intention with which such deposits are commonly made by the humbler class, namely, to enjoy full

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[1] Van Cott *v.* Prentice, 104 N. Y. 45. See also Ames, Cases on Trusts, 2d ed., 233 n.

[2] *Ex parte* Pye, 18 Ves. 140.

[3] Perry, Trusts, 5th ed., § 104. See also Ames, Cases on Trusts, 2d ed., 233 n.

[4] See Dickerson's Appeal, 115 Pa. St. 198, 210.

[5] Clark *v.* Clark, 108 Mass. 522.

[6] Robertson *v.* McCarthy, 66 N. Y. Supp. 327; Jenkins *v.* Baker, 78 N. Y. Supp. 1074.

[7] Matter of Totten, 179 N. Y. 112.

[8] As a rule limiting individual deposits, or giving a higher rate of interest on small deposits. See Brabrook *v.* Boston Bank, 104 Mass. 228; Weber *v.* Weber, 9 Daly (N. Y.) 211.

[9] Brabrook *v.* Boston Bank, *supra*.

ownership of the money during life, but to secure its passage to the named beneficiary upon death. While it may be possible to effect this intention without violating fundamental principles, it is not clear that the New York decision is based upon the correct theory. The transaction must plainly be taken as a present trust if anything, else we meet two difficulties: first, that we are allowing what is in substance a testamentary disposition in irregular form,[10] and second, that equity will not enforce an incomplete voluntary trust.[11] To call it a present trust and still effectuate the depositor's intention can only be done, perhaps with some effort, by finding a power of revocation impliedly reserved to the depositor, who, while the trust remains unrevoked, is trustee for himself for life, with full power of disposal, remainder to the named beneficiary. This theory, however, admittedly somewhat over-nice, does not seem to be the one the court proceeds upon, the apparent reasoning being that a trust of this kind is in its nature revocable during life, but made absolute by death. The idea of death perfecting the trust is clearly indefensible, for the trust if ever created was created at the time the deposit was made, and the sole question is whether the depositor then intended to create a trust of the complex character described.

That the doctrine of tentative trusts will grow by application to analogous cases is shown by a recent New York decision, *Lattan* v. *Van Ness*, 95 N. Y. Supp. 97, which held merely tentative a trust created by transfer of the deposit and the bank book to another as trustee for a third party. Unless this decision can be rested on a similar theory to that suggested above, it would seem a greater departure from principle than the earlier case, for the irrevocability of a trust created in this way was established much earlier and with a sounder basis than that created by mere declaration.

EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DEFECTIVE PERFORMANCE. — A question constantly arising under a contract of sale is whether acceptance of a tender of goods differing from the terms of the contract as to quality, quantity, time or place of delivery prevents a recovery of damages for the imperfect performance. If an express warranty of quality accompanying the sale has been broken, courts generally are agreed that a right of action survives acceptance.[1] But there is confusion in cases of implied warranties. Cases of this kind arise most frequently in reference to the merchantable quality of goods. The weight of authority is that mere acceptance does not prevent the buyer from afterward recovering for breach of promise, either by a separate action, or by counter-claim in an action brought by the seller.[2] Some courts, however, hold that such acceptance precludes any claim for defective performance.[3] On a similar question as to time of delivery, the Kentucky court recently stood evenly divided as to whether the buyer waived any cause of action for delay. *Lucile Min. Co.* v. *Fairbanks, Morse & Co.*, 87 S. W. Rep. 1121.

Though most courts in this class of cases, as in cases where inferior goods have been delivered, hold that mere acceptance does not prevent the buyer

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[10] See Nicklas *v.* Parker, 61 Atl. Rep. 267 (N. J.).

[11] See Bartlett *v.* Remington, 59 N. H. 364.

[1] See Mechem, Sales, 1st ed., § 1395.

[2] English *v.* Spokane Commission Co., 57 Fed. Rep. 451. See Williston's Cases on Sales, 2d ed., 779, note 1.

[3] Studer *v.* Bleistein, 115 N. Y. 316. See 16 HARV. L. REV. 465, 468.